

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

Docket No. 1,061,582

## ORDER

Claimant appealed the July 1, 2014, Award Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Thomas Klein. The parties waived oral argument.

## APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Michael L. Entz of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award Nunc Pro Tunc.

## ISSUES

In her submission letter to the ALJ, claimant requested an 87.5% work disability. Claimant's Application for Review indicated the only issue on appeal is whether the ALJ erred in determining claimant had no permanent impairment. On September 8, 2014, nearly a month after her brief was due, the Division of Workers Compensation received a letter from claimant indicating her submission letter to the ALJ would serve as her brief to the Board. Respondent, in its brief to the Board, maintains claimant's preexisting degenerative disc disease was the prevailing factor causing her current symptomatology. Respondent also asserts credible medical evidence establishes there is no permanent impairment or work restrictions related to claimant's injury.

ALJ Klein found claimant sustained no permanent impairment as a result of her work injury and awarded claimant \$1,213.74 in temporary partial disability benefits. In the Award Nunc Pro Tunc, ALJ Klein stated, "Respondent admits Claimant's alleged accidental injury arose out of and in the course of his *[sic]* employment."<sup>1</sup> At the October 9, 2013, regular hearing, respondent specifically denied claimant met with personal injury by accident arising out of and in the course of her employment with respondent.

The issues before the Board on this appeal are:

1. Was claimant's accident the prevailing factor causing her alleged disability?
2. What is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent on December 8, 2008. Claimant was a certified nurses' aide and her shift was from 2 p.m. to 10:30 p.m. She testified she cared for elderly and disabled individuals and her job duties included getting them up and ready for their supper meal, making sure they were clean and dry, getting them ready for bed and keeping them turned, clean and dry until her shift was over. Before 5 p.m. on May 21, 2012, claimant turned a resident from side to side changing his brief, cleaning him up and getting him dressed to get up. Claimant indicated she placed a lift sling underneath the resident by rolling him one way, scooting the sling underneath him and rolling him the other way and pulling the sling out the other side. She had immediate low back pain and reported the incident to her supervisor, registered nurse Jolene Yoder. Claimant completed her shift.

After her injury, claimant sought medical treatment from her primary care physician at Prairie Star and asked for an MRI, as she had back pain. She acknowledged she did not seek medical treatment at Prairie Star until June 15, 2012. Claimant testified she eventually saw Dr. Janzen, who prescribed physical therapy. Claimant indicated respondent authorized her to see Dr. Sandra Barrett, who prescribed more physical therapy and then released her.

Claimant testified that from May 21, 2012, until June 3, 2013, she continued working, but performed light duty. She testified she was terminated because she was told by respondent there was no work available that she could perform.

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<sup>1</sup> Award Nunc Pro Tunc at 2.

According to claimant, in 2008, she had a work-related low back injury, but did not file a workers compensation claim. She testified she had a work-related upper back injury in 2009, but again did not file a workers compensation claim. Claimant indicated she was not working for respondent when the 2008 injury occurred, but she reported the 2009 injury to respondent. Claimant testified that from 2009 until May 2012, she had no issues with her low back. Claimant testified that prior to working for respondent, she was told she had a bulging disc in her lower back.

At the request of respondent, claimant was evaluated by Dr. Barrett on September 6, 2012. Dr. Barrett reviewed claimant's medical records, took a history and physically examined claimant. The history given by claimant was that she injured her low back on May 21, 2012, while turning a patient. Dr. Barrett's report indicated claimant underwent lumbar, thoracic and cervical MRIs on June 19, 2012, that were ordered by Dr. Albright at Prairie Star.

Dr. Barrett reviewed the June 19, 2012, lumbar MRI report and compared it to the report from claimant's October 13, 2008, lumbar MRI. Dr. Barrett stated:

There are no diagnostic films available for review. However, I do have report of MRI of the lumbar spine from 06/19/12 interpreted with comparison made at 10/13/08. This was interpreted by a Dr. Travis Scott Davis. Impression is of multilevel disk bulge and hypertrophic changes similar to prior study. These findings resulted in central canal stenosis. There is an MRI of the thoracic spine from 06/19/2012 interpreted by Dr. Scott Davis Travis. Impression of multilevel disc bulge with significant central canal stenosis also with the disc dehydration. An MRI [of] the cervical spine from 06/19/12 shows similar findings of multilevel disc bulge and hypotrophic changes with various degree[s] of central stenosis. MRI of the lumbar spine report dated 10-13-2008 show[s] moderate degenerative disk disease with stenosis and small central disk protrusion.<sup>2</sup>

Dr. Barrett's diagnoses were status post work injury with lumbar strain and preexisting cervical, thoracic and lumbar degenerative disc disease and stenosis. The doctor opined there was a causal connection between claimant's lumbar strain and the May 21, 2012, work incident and that the work injury was the prevailing factor for the lumbar strain. However, the doctor indicated the degenerative disc disease and stenosis were preexisting and unrelated to claimant's work accident. Dr. Barrett recommended a course of physical therapy.

After claimant completed physical therapy, she again was physically examined by Dr. Barrett on November 7, 2012. Dr. Barrett testified claimant indicated physical therapy and a trial use of a home TENS unit did not help. When asked if claimant's lumbar strain in any way aggravated claimant's degenerative condition, Dr. Barrett replied:

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<sup>2</sup> Barrett Depo., Ex. 2.

If I go back to the “Radiology” section on the IME, the MRI findings that went from 2008 had shown that patient had a lot of degenerative changes and stenosis, which would have been prior to that work injury. So could it have flared up some of the symptoms in terms of the pain? Yeah, it could’ve exacerbated the preexisting condition, but it did not cause the degenerative changes based on what MRI documented prior.<sup>3</sup>

Dr. Barrett, relying on the *Guides*,<sup>4</sup> opined within a reasonable degree of medical probability that claimant had a zero percent functional impairment rating.

At the request of her attorney, claimant was evaluated by Dr. Pedro A. Murati on November 20, 2012. Dr. Murati took a history from claimant and physically examined her. Claimant indicated that in 2008, she injured her low back in a work-related accident, and that her low back pain subsided. The doctor reviewed claimant’s medical records from Prairie Star and Hutchinson Clinic, but not those of Drs. Barrett and Paul S. Stein. Nor did Dr. Murati have claimant’s October 2008 MRI or MRI report to review. Dr. Murati did review claimant’s June 19, 2012, MRIs. Dr. Murati’s review of the June 19, 2012, lumbar MRI report indicates he came to similar conclusions as Dr. Barrett as to what the MRI revealed.

Dr. Murati’s report indicates he was aware of claimant’s 2008 and 2009 back injuries. The doctor diagnosed claimant with low back pain with signs of radiculopathy and thoracic sprain. He opined within a reasonable degree of medical probability the prevailing factor in the development of claimant’s conditions was her work accident. Dr. Murati testified:

She does have significant preexisting injuries regarding her low back, however, she was released to full duty by Dr. Janzen on 8-28-09 and actually I will quote the note. On that day it said: “Back strain clinical result,” [sic]<sup>5</sup> so I don’t have any documentation that shows me her continuing treatment on a constant basis for a chronic back condition. She was not given permanent restrictions prior to and no settlement was received, so in order to meet the definition of an impairment which is a condition that interferes with activities of daily living which I feel this is not the case because, again, I don’t have a doctor’s note giving her prior impairment or permanent restrictions for her to modify her activities of daily living which includes work. Now, the question has arisen that whether she has degenerative disc disease and that’s the reason that she has pain. Well, even if we assume that that’s the case, there must have been significant structural change in the disc itself for her for

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<sup>3</sup> *Id.* at 7-8.

<sup>4</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>5</sup> Although the transcript reflects the above, Dr. Murati’s November 20, 2012, report states: “Back strain, clinically resolved.” Murati Depo., Ex. 2.

one day to be asymptomatic and then the next day she be symptomatic. Having said that, the vast majority of people that are 40 years and older will have some degree of degenerative disc disease normally. It is still called a disease even though they have no symptoms and that's the vast majority. So, if this argument stands in the courts, then nobody that's older than 40 years old will ever have a successful back claim because they're all -- most of them; I shouldn't say all -- most of them are going to have this condition.<sup>6</sup>

Using the *Guides*, Dr. Murati placed claimant in DRE Thoracolumbar Category II for a 5% whole person functional impairment and in DRE Lumbosacral Category III for a 10% whole person functional impairment, which combined for a 15% whole person functional impairment. The doctor gave claimant permanent restrictions.

By order of the ALJ, claimant was evaluated by Dr. Paul S. Stein on June 18, 2013. Dr. Stein took a history from claimant and physically examined her. The history indicated claimant had a non-work-related problem with her low back in 2008, for which she received no treatment. Claimant reported the problem just went away. The doctor reviewed claimant's medical records dating back to October 9, 2006. Dr. Stein noted October 10, 2008, x-rays of claimant's lumbar spine showed mild degenerative disc disease at L3-4 and L4-5 and moderate degenerative disc disease at L5-S1. He noted the October 13, 2008, lumbar MRI report showed mild generalized disc bulging at L3-4 without significant stenosis, mild-moderate disc bulging at L4-5 with mild bilateral foraminal stenosis and moderate generalized disc bulging at L5-S1 with a focal central protrusion producing moderate to severe bilateral foraminal stenosis and mild central stenosis. The doctor also reviewed records concerning claimant's 2009 back injury and records from Drs. Barrett and Murati.

Dr. Stein compared claimant's 2008 lumbar MRI report and June 2012 lumbar MRI. The doctor also had the June 2012 lumbar MRI report for review. Dr. Stein indicated claimant's June 2012 lumbar MRI report noted there was minimal disc bulging at L3-4 similar to the prior study, mild broad-based disc bulging at L4-5 with ligamentum hypertrophy resulting in minimal bilateral foraminal narrowing and broad-based disc bulging at L5-S1 similar to prior study with moderate to severe bilateral foraminal narrowing. Dr. Stein, who did not testify, opined:

The claimant has some degenerative changes in the cervical and lumbar spine as well as some minor degenerative changes in the thoracic spine. Although I don't have the 2008 images for review, the radiology reports indicate similar findings present in 2008 and any changes are likely due to the natural progression of degenerative disease. The images of June, 2012, do not reflect any acute trauma changes such as a disk herniation. The current symptomatology is a result of aggravation of the preexisting degenerative disease which has been symptomatic

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<sup>6</sup> Murati Depo. at 12-13.

in the past. Therefore, the prevailing or primary factor in the current symptoms is the preexisting degenerative disease. This factor, combined with an essentially negative physical examination, does not allow me to assess a permanent impairment of function specifically in relation to work activity or incidents at work in May of 2012. The same is true for any specific work restrictions which are more related to the degenerative disease than to the specific incidents at work.<sup>7</sup>

The ALJ ruled:

Claimant came under the care of Dr. Barrett. On September 6, 2012 Dr. Barrett diagnosed the claimant status post injury with lumbar strain, with pre-existing cervical, thoracic, and lumbar degenerative disk disease and stenosis. (Barrett p. 5) Dr. Barrett found a causal relationship between the strain and the work injury, with the degenerative changes and stenosis preexisting. Following physical therapy and the use of a TENS unit, Dr. Barrett recommended no work restrictions based on the accident, and released the claimant with a 0% impairment, with home exercises and continuing the use of the TENS unit.

. . .

Dr. Stein performed an IME on behalf of the court on June 18, 2013. Dr. Stein found that claimant's current symptomatology is the result of aggravation of the preexisting degenerative disease which has been symptomatic in the past. (Stein IME report, p. 6) He identified the prevailing factor for the current symptoms as the preexisting degenerative disease. He provided no rating or restrictions as a result of the accident.

The court finds the testimony of Dr. [Barrett] conclusive in this matter, and finds that the claimant suffered a lumbar strain, that resolved to a pre-existing baseline, that she gave notice of her injury on May 21, 2012, that the prevailing factor in the need for physical therapy and the TENS unit was the work injury, and that the claimant suffered no permanent impairment as a result of her work injury. The court notes, that while Dr. Stein testified that the prevailing factor in the claimant's case was her pre-existing condition, he examined the claimant on June 18, 2013. The date of his exam is 7 months after Dr. Barrett had released the claimant from her lumbar strain and attributed claimant's remaining condition to her pre-existing condition. Viewed in that light, the opinions of Dr. Stein and Dr. Barrett are not in conflict.<sup>8</sup>

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<sup>7</sup> Stein IME Report at 6-7.

<sup>8</sup> Award Nunc Pro Tunc at 3.

**PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>9</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>10</sup>

K.S.A. 2011 Supp. 44-508(f), in part, states:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The three physicians who examined claimant gave divergent opinions concerning causation and permanent functional impairment. Dr. Stein opined the prevailing factor for claimant’s symptoms was her preexisting degenerative disease and claimant sustained no permanent functional impairment. One of Dr. Barrett’s diagnoses was status post work injury with lumbar strain. However, Dr. Barrett opined claimant’s work accident resulted in no permanent functional impairment. Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and thoracic sprain. He opined within a reasonable degree of medical probability the prevailing factor in the development of claimant’s conditions was

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<sup>9</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>10</sup> K.S.A. 2011 Supp. 44-508(h).

her work accident. He assigned claimant a 15% whole person permanent functional impairment.

The ALJ, indicating Dr. Barrett's testimony conclusive, found claimant's accident resulted in a lumbar strain, but the lumbar strain resolved to a preexisting baseline and claimant did not suffer a permanent impairment of function. The Board concurs with the ALJ's findings.

Dr. Stein, appointed by the ALJ, concurred with Dr. Barrett that claimant sustained no permanent functional impairment. Dr. Stein concluded claimant's June 2012 MRI did not reflect any acute trauma changes such as a disc herniation. Conversely, Dr. Murati concluded claimant had low back pain with signs of radiculopathy. Unlike Drs. Barrett and Stein, Dr. Murati did not review claimant's 2008 MRI film or report and, therefore, was unable to compare claimant's 2008 and 2012 MRI results. Dr. Murati relies on claimant's history and subjective complaints as well as Dr. Janzen's August 28, 2009, notes that claimant's back strain was clinically resolved. Dr. Murati assumed there must be a structural change in claimant's low back because she was asymptomatic before her accident and only became symptomatic after her accident. Simply put, the Board finds more credible the opinions of Drs. Barrett and Stein that claimant sustained no permanent functional impairment as a result of her May 2012 work injury than the functional impairment opinion of Dr. Murati.

### **CONCLUSION**

1. The lumbar strain claimant sustained by accident on May 21, 2012, resolved and she sustained no permanent functional impairment as the result of her May 21, 2012, work injury.

2. Prior to the May 21, 2012, injury by accident, claimant sustained cervical, thoracic and lumbar degenerative disc disease and stenosis. However, claimant's work accident was not the prevailing factor causing the abovementioned preexisting conditions.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>11</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the July 1, 2014, Award Nunc Pro Tunc entered by ALJ Klein and corrects the award of temporary partial disability benefits.

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<sup>11</sup> K.S.A. 2013 Supp. 44-555c(j).



Claimant is entitled to \$1,213.74 in temporary partial disability benefits, making a total award of \$1,213.74, which is all due and owing less any amounts previously paid.

The ALJ approved a contract for attorney fees, but the administrative file contains no contract. K.S.A. 2011 Supp. 44-536(b) requires an attorney fee contract to be filed with the Director. The ALJ's order approving attorney fees is vacated. Claimant's counsel is instructed to file a contract for attorney fees with the Director and seek approval of the contract from the ALJ.

The Board adopts the remaining orders set forth in the Award Nunc Pro Tunc to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge